

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

**Apr 19, 2022**

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

JAMES THOMAS BURKE,

Plaintiff,

vs.

STATE OF WASHINGTON,  
SPOKANE COUNTY, SPOKANE  
SHERIFFS OFFICE, DAVE REAGAN,  
EASTERN WASHINGTON JOINT  
FUGITIVE TASK FORCE and U.S.  
MARSHAL SERVICE (UNKNOWN  
OFFICER),

Defendants.

No. 2:22-cv-00004-MKD

ORDER DISMISSING COMPLAINT  
WITH PREJUDICE

**1915(g)**

Before the Court are Plaintiff's three responses, ECF Nos. 22–24, to the Order to Show Cause or Voluntarily Dismiss Complaint issued by the Court on March 21, 2022, ECF No. 11. Specifically, the Court directed Mr. Burke to show cause why his Complaint, asserting the excessive use of force during his arrest in 2005, ECF No. 1, should not be dismissed as time-barred. ECF No. 11 at 9.

ORDER DISMISSING COMPLAINT WITH PREJUDICE -- 1

1 Plaintiff, a Vermont prisoner currently housed at the Tallahatchie County  
2 Correctional Facility in Tutwiler, Mississippi, is proceeding *pro se* and *in forma*  
3 *pauperis*. ECF No. 17. The Court has not directed that Defendants be served with  
4 the Complaint. Liberally construing Plaintiff's assertions in the light most  
5 favorable to him, the Court finds that Mr. Burke has failed to show cause why his  
6 Complaint should not be dismissed as time-barred.

7 Plaintiff asserts on the fifth page of his first response<sup>1</sup> that, under *Heck v.*  
8 *Humphrey*, 512 U.S. 477 (1994), his § 1983 cause of action has not yet "accrued"  
9 because he is still pursuing the invalidation of his allegedly unlawful conviction in  
10 Vermont. ECF No. 22 at 5. A plaintiff who challenges conduct that resulted in a  
11 valid criminal conviction has no cognizable cause of action under section 1983 if  
12 the civil claim would imply the invalidity of the prior conviction. *Heck*, 212 U.S.  
13 at 483. In *Heck*, the plaintiff sought damages against police and prosecutors for  
14 conducting an arbitrary investigation, knowingly destroying exculpatory evidence,  
15 and causing an illegal voice identification to be used at his trial which resulted in  
16 his conviction for the charged offenses. *Id.* at 479.

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19 <sup>1</sup> The first three pages of Plaintiff's second and third responses are substantially the  
20 same, save for differences in highlighting and the fact that handwritten citations have  
been typed. *See* ECF No. 22 at 2–4; ECF No. 23 at 3–5; and ECF No. 24 at 2–4.

1 Here, Plaintiff is challenging the excessive use of force to effectuate his  
2 arrest in Spokane, Washington, in 2005. This cause of action for damages is in no  
3 way attributable to an unconstitutional conviction or sentence. *Id.* at 489. A  
4 finding in Plaintiff's favor would not affect the validity of his subsequent sexual  
5 assault conviction in Vermont. Consequently, "if the district court determines that  
6 the plaintiff's action, even if successful, will not demonstrate the invalidity of any  
7 outstanding criminal judgment against the plaintiff, the action should be allowed to  
8 proceed, in the absence of some other bar to the suit." *Id.* at 486–87 (internal  
9 citations omitted); *see also Wallace v. Kato*, 549 U.S. 384, 393 (2007) (concluding  
10 that petitioner could have brought his § 1983 action challenging his false arrest  
11 immediately after being arrested, without waiting for the resolution of his criminal  
12 case, and stating that *Heck* would not be a bar because there has been no  
13 conviction yet).

14 In this case, the "other bar to the suit," *Heck*, 512 U.S. at 487, is the statute  
15 of limitations. *See* ECF No. 11 at 5–8. Plaintiff invites the Court to apply *Bianchi*  
16 *v. Bellingham Police Dept.*, 909 F.2d 1316 (1990), to toll the running of the three-  
17 year statute of limitations. *See* ECF No. 22 at 1, 5–7; ECF No. 23 at 6. He  
18 contends that his "incarcerated disability has . . . yet to be removed," because he  
19 has been continuously incarcerated since May 25, 2005. ECF No. 22 at 4–6; ECF  
20 No. 23 at 5–7. Plaintiff's reliance on *Bianchi* is misplaced.

1 At the time *Bianchi* was decided in 1990, it was true that Washington's  
2 tolling provision, RCW 4.16.190 (1989), applied to plaintiffs "imprisoned on a  
3 criminal charge, or in execution under the sentence of a court for a term less than  
4 his natural life." *Bianchi*, 909 F.2d at 1318. That tolling provision applied to Mr.  
5 Bianchi who had been "continuously imprisoned since his arrest." *Id.*

6 Since 2004, however, the Ninth Circuit has recognized that an arrestee's  
7 causes of action under Washington law for false arrest, false imprisonment,  
8 negligence, and personal injury were tolled only until the date when the arrestee  
9 was sentenced. *See Gausvik v. Perez*, 392 F.3d 1006, 1009 (9th Cir. 2004). Mr.  
10 Burke does not dispute that he was sentenced in Vermont in 2010 on the sexual  
11 assault charges that were pending when he was arrested in Spokane, Washington,  
12 in May 2005. ECF No. 11 at 6.

13 Plaintiff cites to *Hardin v. Straub*, 490 U.S. 536 (1989) for the proposition  
14 that Washington's three-year statute of limitation should be tolled. ECF No. 22 at  
15 4; ECF No. 23 at 5; and ECF No. 24 at 4–5. *Hardin* involved a Michigan statute  
16 that suspended limitations periods for those under legal disability, including  
17 prisoners, until one year after their disability had been removed. Even if this one-  
18 year suspension applied, the disability under Washington law in this case was  
19 removed upon sentencing in 2010. *See Gausvik*, 392 F.3d at 1009. Plaintiff did  
20 not submit his complaint to this Court until January 1, 2022. *See* ECF No. 1-3 at 1.

1 Because considerably more than three years elapsed after he was sentenced  
2 in 2010 and before he initiated his civil rights action in this District in 2022,  
3 Plaintiff's cause of action is clearly time barred. *See RK Ventures, Inc. v. City of*  
4 *Seattle*, 307 F.3d 1045, 1058 (9th Cir. 2002); *Millay v. Cam*, 135 Wash.2d 193  
5 (1998) (requiring "bad faith, deception, or false assurances by the defendant and  
6 the exercise of diligence by the plaintiff," for equitable tolling to apply).

7 Although provided the opportunity to do so, Plaintiff has failed to  
8 demonstrate either a statutory or equitable basis to toll the running of  
9 Washington's three-year statute of limitations in this action. *See Levald, Inc. v.*  
10 *City of Palm Desert*, 998 F.2d 680, 686-87 (9th Cir. 1993). Plaintiff also did not  
11 avail himself of the opportunity to voluntarily dismiss this action.

12 Accordingly, **IT IS ORDERED** that the Complaint, **ECF No. 1**, is  
13 **DISMISSED WITH PREJUDICE** as time-barred. This is a qualifying dismissal  
14 under 28 U.S.C. § 1915(g). *See Belanus v. Clark*, 796 F.3d 1021, 1023 (9th Cir.  
15 2015).

16 Pursuant to 28 U.S.C. § 1915(g), enacted April 26, 1996, a prisoner who  
17 brings three or more civil actions or appeals that are dismissed as frivolous,  
18 malicious, or for failure to state a claim will be precluded from bringing any other  
19 civil action or appeal *in forma pauperis* "unless the prisoner is under imminent  
20 danger of serious physical injury." 28 U.S.C. § 1915(g). Plaintiff is advised to read

1 the statutory provisions under 28 U.S.C. § 1915. This dismissal of Plaintiff's  
2 Complaint may adversely affect his ability to file future claims.

3 The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal of this  
4 Order would not be taken in good faith and would lack any arguable basis in law or  
5 fact.

6 **IT IS SO ORDERED.** The Clerk of Court is directed to enter this Order,  
7 enter judgment, provide copies to Plaintiff at his last known address, and **CLOSE**  
8 the file. The Clerk of Court is further directed to provide a copy of this Order to the  
9 Office of the Attorney General of Washington, Criminal Justice Division.

10 DATED April 19, 2022.

11 s/Mary K. Dimke  
12 MARY K. DIMKE  
13 UNITED STATES DISTRICT JUDGE  
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